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No. 89-322

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

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PETITIONER'S REPLY BRIEF

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1. In reply to respondents' opposition, it is important at the outset to make clear what is, and what is not, at issue in this case. Respondents' opposition never joins issue with the legal questions presented in our petition. Rather, respondents rest their opposition on a characterization of the case apparently designed to avoid those questions. Thus, respondents repeatedly assert or suggest that this case is about negligent "actions" by the union. Br. in Opp. at 5; *see also* 9, 10, 12, 15, 16-17. In respondents'

words, this case "involve[s] an overt *act* characterized as either a *misfeasance* or *malfeasance*." *Id.* at 16-17 (emphasis in original).

Based on that characterization, respondents assert a legal proposition with which we do *not* disagree: If a union official, in the course of carrying out *any* union function, commits an affirmative act of negligence that increases the risk of harm to persons or property or creates a risk of harm that did not otherwise exist, the union may be liable for resulting injuries in a state-law tort action. For example, if a union official, in the course of investigating a grievance, negligently operates a motor vehicle, causing injury to person or property, federal law would not preempt a state-law tort claim against the union based on that negligent conduct. Similarly, a state tort claim against a union would not be preempted where a union official, in the course of accompanying a company or state inspector on an inspection of a workplace, attempts to repair a piece of equipment and does so negligently, thereby causing the equipment later to malfunction and injure its operator.

But that proposition has no application to this case. While respondents use words like "overt act" and "malfeasance," nowhere in their opposition do they identify any such union conduct. In fact, throughout the many years of this litigation, respondents have never alleged, and have never presented any evidence, that the union here did anything that created a risk of harm or that increased any preexisting risk of harm.

In this regard, the facts as to what the union did or did not do in this case are simple and are *not* in dispute. First, the union entered into a contract with the company, which permitted the union to designate a representative "to accompany" the company's safety engineer on the engineer's monthly "tour of a section of the mine" (171a; see also Pet. at 4). The contract also permitted a

union representative to "accompany" the State Mine Inspector on any state inspection of the mine (*id.*). The agreement gave the union no authority to change safety practices in the mine; rather, union representatives, through a joint labor-management safety committee, were permitted by the contract only to submit "advices," "suggestions [and] recommendations" to the plant manager "for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees . . ." (170a-171a). Second, the union on at least some occasions exercised this contractual right to accompany a company engineer or state inspector. Third, there is no evidence, or allegation, that any union representative committed any affirmative act of negligence in the course of accompanying these inspectors.

As the opinion of the Supreme Court of Idaho—as well as respondents' complaint and respondents' opposition in this Court—makes clear, the alleged negligence here consists entirely of actions the union might have taken, but did not take, that might have led to the correction or mitigation of certain safety "deficiencies" that already were present in the mine and that purportedly contributed to the mine disaster. (27a-29a; Pet. at 5-6; see also Br. in Opp. at 6-7.) In the words of the Supreme Court of Idaho:

> The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies.

(28a-29a; see also Br. in Opp. at 7.)

The two federal questions presented in our petition are thus squarely raised. The first question is clearly framed by what we have said to this point: Whether the federal

duty of fair representation preempts a state-law tort action that is based solely on the union's alleged failure to take certain actions in the course of exercising its authority to enforce the safety provisions of the collective bargaining agreement.

The second question is equally straightforward. Respondents and the court below assert that the union "undertook" a duty to inspect. (6a; Br. in Opp. at 9-10.) But such an undertaking could only be found in the collective bargaining agreement. Absent a contractually imposed duty to inspect, a union does not have a general duty to discover and report safety hazards; and a state could not impose such a duty consistent with federal labor law. Accordingly, the second question here is also directly presented: whether federal law—in particular, § 301 of the Labor Management Relations Act—preempts state law on the disputed question of whether the collective bargaining agreement imposed a duty upon the union to discover and report safety hazards.

2. In their opposition, respondents do not directly address the first question presented in the petition. Respondents do not dispute the preemptive effect of the duty of fair representation, or the importance of the duty's application to union activities related to safety, or the need for this Court to address that question in this case. Two points, however, merit a brief reply.

First, lest respondents' opposition raise any confusion on the point, it is important to make clear that the issue of how to characterize the union's activities in connection with inspections has no relevance to the first question presented in the petition. The question of duty of fair representation preemption is squarely raised whether the union "inspected" the mine or whether the union only "accompanied" those who inspected the mine. Whatever the characterization, the undisputed facts are that the union was engaged in the activities that were authorized by the safety article of the collective bargaining agreement, and that it was doing so solely in its capacity as exclusive bargaining representative for the miners. The only allegations of negligence, as we have already noted, are that in the course of those activities the union failed to identify certain hazards or call them to the attention of the company. The trial court found, and the Idaho Supreme Court did not disagree, that the claims against the union were based solely on the union's "representational duties" and "the manner in which the Union carried out the collective bargaining agreement." *See* Pet. at 7. The question whether the duty of fair representation sets the only standard by which that conduct can be judged, or whether state law can set different or additional standards of conduct that the union must meet, cannot depend to any degree on whether the union's activities are characterized as "inspecting" or as merely "accompanying an inspector."

Second, although they do not directly discuss the first question presented, respondents do purport to offer a distinction between the decision in *Condon v. Local 2944, United Steelworkers of America*, 683 F.2d 590 (1st Cir. 1982) and the decision below. Without explaining the relevance of the asserted distinction, respondents state that *Condon* was "a *nonfeasance* case," rather than a "misfeasance" case, which they say this case is. Br. in Opp. at 15. Putting aside whether those characterizations are correct, this is a distinction without a difference. Whatever significance the distinction between nonfeasance and misfeasance may have for Idaho law, *id.*, it has no significance for the principles that underlie the federal duty of fair representation. This Court has never drawn a distinction between "nonfeasance" and "misfeasance" either in defining a union's duty of fair representation or in drawing the bounds of federal preemption.

In any event, the opinion in *Condon* leaves no doubt that that case conflicts squarely with the decision of the Supreme Court of Idaho on the first question presented. The First Circuit stated:

> The thrust of appellant's argument as to Counts V and VI is that, under New Hampshire law, one who undertakes to fulfill a safety monitoring function, whether gratuitously or for consideration, has a duty to exercise reasonable care under the circumstances and may be held liable to a third party for failing to carry out that duty. . . . According to appellant, Local undertook such a duty, and this duty arose independent of Local's obligations under the collective bargaining agreement.
>
> The collective bargaining agreement cannot so cavalierly be pushed aside. Without the collective bargaining agreement, there would be neither a local union nor a union safety committee.
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>
> The Supreme Court has observed that in certain areas state law may constitute an impermissible obstacle to the accomplishment of the purposes of Congress by regulating conduct that federal law has chosen to leave unregulated. . . . A union's rights and duties as the exclusive bargaining agent in carrying out its representational functions is precisely such an area; Congress has "occupied th[e] field and closed it to state regulation." . . .
>
> We . . . conclude that a union cannot be held liable for the negligent performance of a duty it assumed that arose inextricably, as here, from the safety and health provisions of a collective bargaining agreement.

683 F.2d at 594-95.[1]

[1] Indeed, the claim in *Condon* presents a striking parallel to the claim in this case. The plaintiff in *Condon* was burned when sparks from a welding torch set his shirt on fire. *Id.* at 591. He alleged that the union had "negligently failed to carry out" its alleged duty "to ensure that the equipment on the premises was in a safe operating condition and that sufficient fire safety equipment was available." *Id.* at 592-93. These allegations are, for all practical purposes, identical to respondents' allegations that the union in this case negligently "failed to require" fire drills, personal protective equipment, and adequate emergency egress from the mine. See Pet. at 6, Br. in Opp. at 6-7.

3. Respondents suggest that because the union in this case was "an active tortfeasor," the preemption questions are governed by *Linn v. Plant Guard Workers Local 144*, 383 U.S. 53 (1966), and *Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977). Br. in Opp. at 16-17. As we have shown, the label "active tortfeasor" cannot accurately be applied to the allegations of negligence in this case. But even if the label were appropriate, those allegations of negligence do not rise to the level of the intentional torts that this Court allowed state law to redress in *Linn* and *Farmer*.

In *Linn* the Court held that state-law claims for "malicious libels," 383 U.S. at 61, are not preempted, so long as they are limited "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage," *id.* at 65. In *Farmer* the Court allowed a state-law claim for intentional infliction of emotional distress, emphasizing that liability could be established only upon "proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress." 430 U.S. at 304. The state-law claims in *Linn* and *Farmer* are thus entirely different from respondents' allegations that the union negligently failed to observe and report preexisting hazards in the mine.

4. Respondents suggest that this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877 (1988), is somehow determinative in this case. Br. in Opp. at 9, 12-13, 17. As we show, however, the only bearing *Lingle* has on this case is that it reconfirms the analysis of this Court's decision in *IBEW v. Hechler*, 481 U.S. 851 (1987), on which we rely in connection with the second question presented.

First, *Lingle* has no bearing on the first question presented by our petition—whether the duty of fair representation independently preempts respondents' state-law claim. *Lingle* addresses only the preemptive effect of § 301; as the *Lingle* Court stated in its opinion, *Lingle* has no bearing on other aspects of federal labor-law preemption:

> Although § 301 pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement, and although § 301 pre-emption is all that is at issue in this case, it is important to remember that other federal labor law principles may pre-empt state law.

108 S. Ct. at 1883 n.8.

On the second question presented in our petition, *Lingle* simply confirms the analysis on which we have relied. The question in *Lingle* was whether § 301 preempted a state-law tort claim that was based on allegations that the plaintiff's employer had fired her in retaliation for filing a workers' compensation claim. Although the plaintiff was also covered by a collective bargaining agreement that protected her from discharge except for "just cause," the Court held that § 301 did not preempt the state-law claim because the state claim was "'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 1882.

This case does not resemble *Lingle* at all. This is not a case where the state tort action can proceed and be resolved without any reference to the terms of the collective bargaining agreement. Instead, it is just like *Heckler*, where the union is alleged to have assumed a duty under state tort law by virtue of the terms of a collective bargaining agreement, and where therefore, as the Idaho

Supreme Court acknowledged before *Hechler* was decided, the "nature and scope of the Union's duty" are defined by that collective bargaining agreement (33a). Respondents contend that the agreement created a duty to "inspect" the mine; the union contends that the agreement gave it a right, but not a duty, to perform a far more limited function—*i.e.*, to "accompany" those who did have a duty to inspect the mine. Pet. at 3-4, 23-24; *see also*, p. 2-3, *supra*. The scope of the union's duty, if any, in connection with inspections of the mine is necessarily dependent on what the agreement authorized the union to do, and that question could not be decided without interpreting the disputed provisions of the agreement.

The Idaho Supreme Court attempted to avoid the force of *Hechler* by asserting that the union had "conceded" that it had undertaken to inspect the mine. As we showed in our petition, there was no such concession. Pet. at 9-10, 22. Indeed, the only evidence on the summary judgment record of what the union was actually doing in connection with inspections was that it was doing only what the agreement authorized. Pet. at 9, 23-24. Significantly, respondents make no attempt to defend the assertion that there was such a concession. Rather, they simply assert, without any record support, that the union "did in fact actively engage in the duty of safety inspection." Br. in Opp. 10. Section 301 preemption cannot be avoided either by pretending that the union made a concession it did not make or by pretending that there is evidence that the union was engaged in inspecting. The facts on this point are not in dispute: union representatives were present during some inspections of the mine. What is in dispute is the function of those representatives: were they carrying out a duty to "inspect" the mine or were they exercising the union's right to "accompany" those who were inspecting the mine. That dispute cannot be resolved without interpreting the collective bargaining agreement.

CONCLUSION

For these reasons, and for the reasons stated in the petition, the petition for writ of certiorari should be granted to review the judgment of the Supreme Court of Idaho.

Respectfully submitted,

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